

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE

FAIRFIELD IMPORTS, LLC d/b/a  
FAIRFIELD TOYOTA, MOMENTUM  
AUTOGROUP and MOMENTUM  
TOYOTA OF FAIRFIELD

And

Cases 20–CA–035259  
20–CA–070368  
20–CA–088332  
20–CA–106248

AUTOMOTIVE MACHINISTS LOCAL  
LODGE NO. 1173, DISTRICT LODGE 190,  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS, AFL–CIO

*Matthew C. Peterson, Esq. and Elvira T. Pereda, Esq.*  
for the General Counsel.

*Caren P. Sencer, Esq and David A. Rosenfeld, Esq.*  
*(Weinberg, Roger & Rosenfeld)*  
for the Charging Party.

*Patrick Jordan, Esq. (Jordan Law Group)*  
for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in San Francisco, California over a 7-day period between September 10, 2013, and January 24, 2014, upon the order consolidating cases, consolidated complaint, and notice of hearing, as amended<sup>1</sup> (complaint), issued on July 31, 2013, by the Regional Director for Region 20.

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<sup>1</sup> On August 14, 2013, the Regional Director for Region 20 issued an amendment to consolidated complaint adding paragraphs 10–16. See GC Exh. 1(x). At the trial on September 10, 2013, Counsel for the General Counsel moved to further amend the consolidated complaint to allege that Respondent changed its practice of allowing employees to take scrap tires without bargaining with the Union in violation of Section 8(a)(5) of the Act. See GC Exh. 2. The motion was granted.

The complaint alleges that Fairfield Imports d/b/a Fairfield Toyota, Momentum Autogroup and Momentum Toyota of Fairfield violated the Act by engaging in the following unfair labor practices:

The complaint alleges Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing in its employee handbook a section prohibiting employees from providing information, including references about company employees to any outside source; by maintaining and enforcing in its employee handbook a section telling employees if they are approached by any member of the media and asked about any company information, do not comment and refer the person to your manager, since February 28, 2013; by maintaining and enforcing a confidentiality agreement prohibiting employees from disclosing, copying, communicating or divulging any material provided by Respondent, since February 28, 2013, and by maintaining and enforcing a binding arbitration agreement that requires employees to forgo any rights they have to resolution of employment-related disputes by collective or class action.

The complaint alleges that Respondent violated section 8(a)(1) and (3) of the Act by terminating employee Frank Bartolomucci for engaging in union or other concerted protected activity.

The complaint alleges that Respondent violated Section 8a(1) and (5) of the Act by reducing employees' service labor time by issuing customer coupons on repairs and services; by changing employees' work schedules from five 8-hour days per week to four 10-hour days per week; by changing unit employee Andy Pham's wages from \$21 per hour to \$25 per hour; by changing unit employee Oscar Larin's wages from \$21 per hour to \$23 per hour; by changing its practice of allowing unit employees to remove scrap tires from its facility for personal use, and by requiring employees sign a binding arbitration agreement without notice to or bargaining with the Union.

The complaint also alleges that Respondent violated Section 8(a)(1) and (5) of the Act by bypassing the Union and dealing directly with unit employees by soliciting their vote on whether Respondent should change employees' work schedules; by failing and refusing to bargain with the Union over warning, counseling, disciplining or terminating unit employees; by failing to bargain over the decision or the effects of terminating Frank Bartolomucci, and by failing to furnish the Union with witness statements pertaining to Bartolomucci's termination.

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing.

#### FINDINGS OF FACT

Upon the entire record here, including the briefs from Counsel for the General Counsel and Respondent, I make the following findings of fact.

## I. JURISDICTION

Respondent admitted it is a limited liability corporation with an office and place of business located in Fairfield, California where it is engaged in the business of selling and servicing automobiles. Annually, Respondent, in the course of its business operations, derived gross revenues in excess of \$500,000 and purchased and received at its Fairfield facility goods valued in excess of \$5,000 directly from points located outside the State of California. Respondent admits in its answer and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION

Respondent admits and I find that Automotive Machinists Local Lodge No. 1173, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL–CIO, (Union) is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent admitted that its owner Rahim Hassanally, Human Resources Director Michelle Lopez, Service Manager Sheila Bamba and Parts Manager Brian Darnoncourt are supervisors within the meaning of section 2(11) of the Act. Respondent further admitted that the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part time Automotive Technicians employed by Respondent at its facility located at 2575 Automall Parkway, Fairfield, California, excluding all other employees, guards, and supervisors as defined in the Act.

Respondent also admits that on March 11, 2010, an election was conducted in Case 20–RC–18287 among employees in the above unit employed by White Motor Sales d/b/a Fairfield Toyota and that since June 22, 2010, Respondent has been a successor to White Motor Sales. On October 6, 2010, the Board certified the Union as the exclusive collective-bargaining representative of employees in the above unit.

Respondent refused to recognize or bargain with the Union until May 12, 2012, when the United States Court of Appeals for the District of Columbia Circuit found Respondent’s conduct unlawful and ordered it to recognize and bargain with the Union.<sup>2</sup> From June 6, 2012, to August 13, 2013, Respondent and the Union held a number of bargaining sessions, but failed to reach a collective-bargaining agreement.

*A. The Alleged Unlawful Handbook Provisions*

The Board has held that the maintenance of a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights violates Section 8(a)(1) of the Act. *Martin Luther Memorial Home, Inc.*, 343 NLRB 646 (2004), citing *Lafayette Park Hotel*, 326 NLRB

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<sup>2</sup> GC Exhs. 20–22 and 24.

824 (1998). In *Martin Luther Memorial Home* the Board concluded that a rule will be unlawful if it:

- (1) explicitly restricts activities protected by Section 7;
- (2) employees would reasonably construe the language to prohibit Section 7 activity;
- (3) the rule was promulgated in response to union activity; or
- (4) the rule has been applied to restrict the exercise of Section 7 rights.

# 1. The outside inquiries provision

## *a. The facts*

Paragraph 7(b) of the complaint alleges that Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing a handbook provision dealing with outside inquiries.

The parties stipulated that since June 24, 2010, Respondent maintained an employee handbook<sup>3</sup> that applies to members of the bargaining unit. The handbook contains a clause entitled “Outside Inquiries Concerning Employees” that provides:

All inquiries concerning employees from outside sources should be directed to the Human Resources Director. Employees are prohibited from providing information, including references, about Company employees to any outside source.<sup>4</sup>

## *b. The analysis*

Respondent’s “Outside Inquiries Concerning Employees” provision in its employee handbook is similar to language that the Board has found in violation of Section 8(a)(1) of the Act in *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n. 3 (1999). The rule in *Flamingo Hilton* prohibited employees from revealing confidential information about customers, hotel business, or “fellow employees.” Similarly in *IRIS USA, Inc.*, 336 NLRB 1013, 1013 n.1 (2001) the Board found a rule that instructs employees to keep information about employees strictly confidential unlawful. I find Respondent’s rule similarly violates section 8(a)(1) of the Act.

# 2. The publicity provision

## *a. The facts*

Paragraph 7(c) of the complaint alleges that Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing a handbook provision dealing with publicity.

The handbook contains a clause entitled “Publicity” that states:

<sup>3</sup> GC Exh. 4.

<sup>4</sup> Id. at p. 10.

The Company may utilize media resources in the course of advertising, public relations or other similar conduct for business purposes. As such, the Company may use your photograph, picture and/or voice for promotion or advertising at any time, without notice and additional compensation. If you are approached by any member of the media and asked about any company information, please do not comment and kindly refer the person to your manager.<sup>5</sup>

*b. The analysis*

The Publicity provision of Respondent’s employee handbook is similar to language that the Board has found violates Section 8(a)(1) of the Act because it restricts Section 7 activities. *Remington Lodging & Hospitality, LLC*, 359 NLRB No. 95, slip op. at page 4 (2013). The rule in *Remington* provided that employees, “agree not to give any information to the news media regarding the hotel, its guests, or associates [i.e., employees], without prior authorization from the General Manager and to direct such inquiries to his attention.” In *Double Eagle Hotel & Casino*, 341 NLRB 112, 114 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006) similar language prohibiting disclosure of “any confidential or sensitive information concerning the Company or any of its employees to any nonemployee without approval from [management]”, was also found to violate Section 8(a)(1) of the Act. The language of Respondent’s Publicity provision is virtually identical to the language found to violate Section 8(a)(1) of the Act in *Remington* and *Double Eagle* and also violates Section 8(a)(1) of the Act.

3. The confidentiality agreement

*a. The facts*

Paragraph 7(d) of the complaint alleges that Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing a confidentiality agreement prohibiting employees from disclosing, copying, communicating or divulging material provided by Respondent.

The parties stipulated that an At-Will Arbitration Agreement and Privacy Policy and Safeguarding Agreement and Confidentiality Agreement<sup>6</sup> was signed by unit employee Bartolomucci on July 2, 2010, and a modified version of At-Will Arbitration Agreement, Confidentiality Agreement and Privacy Policy and Safeguarding Agreement<sup>7</sup> was signed by unit employee Joani Pereira on June 12, 2012.

The confidentiality agreement provides in pertinent part:

Employee agrees that all information communicated to him/her concerning the work conducted by or for Employer is confidential. Employee also agrees that all financial data, sales information, product specifications, customer names and addresses, vendor information, pricing and bid information, personnel information, and any documents generated by Employer, or by Employee in the course of his/ her employment are

<sup>5</sup> Id. at p. 37.

<sup>6</sup> GC Exh. 6.

<sup>7</sup> GC Exh. 7.

confidential. Employee further agrees that information concerning the work conducted by Employer, including but not limited to information concerning future and proposed products, projects or sales which are planned, under consideration or in production/process, as well as existing work/sales additionally constitute confidential information of Employer.

\* \* \*

Employee promises and agrees that he/she shall not disclose any confidential or trade secret information to any other person.

Employee shall use his/her best efforts to prevent inadvertent disclosure of any confidential information to any third party by using the same care and discretion that he/she uses with information he/she considers confidential.<sup>8</sup>

*b. The analysis*

In *FlexFrac Logistics, LLC*, 358 NLRB No. 127, slip op. at 1–2 (2012), the Board concluded that a rule providing the following violated the Act:

Employees deal with and have access to information that must stay within the Organization. Confidential Information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; [our] organization management and marketing processes, plans and ideas, processes and plans; our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any [of our] records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.

The language contained in Respondent’s confidentiality agreement is similar to language that the Board has held unlawfully overbroad because employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives. *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80, slip op. at 12 (2011); *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1013 fn. 1, 1015, 1018 (2001).

I find Respondent’s confidentiality agreement unlawfully overbroad and that it violates Section 8(a)(1) of the Act.

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<sup>8</sup> GC Exh. 5.

#### 4. The arbitration agreement

##### *a. The facts*

Complaint paragraphs 7(e) and (f) allege that Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing and requiring employees to sign a binding arbitration agreement that requires employees to forgo any rights they have to resolution of employment related disputes by collective or class action.

Respondent's arbitration agreement provides:

. . . I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other government dispute resolution forum between myself and the company (or its owners, directors, officers, managers, employees, agent and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the company, whether based on tort, contract, statutory or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers Compensation Act, and the Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. . . .<sup>9</sup>

##### *b. The analysis*

In *D.R. Horton*, 357 NLRB No. 184, Slip op. at 1 (2012) the employer required each new and current employee to execute a "Mutual Arbitration Agreement" (MAA) as a condition of employment.

The MAA provided in relevant part:

☐ that all disputes and claims relating to the employee's employment with Respondent (with exceptions not pertinent here) will be determined exclusively by final and binding arbitration;

☐ that the arbitrator "may hear only Employee's individual claims," "will not have the authority to consolidate the claims of other employees," and "does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding"; and

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<sup>9</sup> GC Exh. 6.

□ that the signatory employee waives “the right to file a lawsuit or other civil proceeding relating to Employee’s employment with the Company” and “the right to resolve employment-related disputes in a proceeding before a judge or jury.”

5 The Board concluded that the MAA, as a condition of employment, required employees waive their right to pursue class or collective litigation of claims in any forum, arbitral or judicial. The Board concluded that such an agreement violates Section 8(a)(1) of the Act because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity.

10 The agreement at issue here, while not barring employees from filing actions under the Act, restricts the exercise of other rights protected by Section 7, including filing collective claims in other federal and state forums for vindication of rights under state wage and hour laws and federal health and safety regulations under OSHA.

15 I find that Respondent’s arbitration agreement requires a mandatory waiver of employees’ Section 7 rights and violates Section 8(a)(1) of the Act.

*c. Respondent’s defense*

20 At the bargaining table Respondent’s chief negotiator, Patrick Jordan, said that Respondent would not enforce the arbitration and confidentiality agreements. When Union Representative Hollibush asked Jordan if Respondent would notify employees of this, Jordan said no. Jordan repeated that Respondent would not rescind these clauses. The parties stipulated  
25 that the only written notice that Respondent gave its employees regarding the enforcement of its arbitration and confidentiality agreements was a memorandum from Human Resources Manager Michelle Lopez dated August 12, 2013, which states in part<sup>10</sup>:

30 In the meantime we want to advise you certain provisions of our current handbook have not been enforced for some time and will not be enforced until this matter is concluded. For example, the section of our handbook entitled “outside inquiries concerning employees”, “publicity,” confidentiality and binding arbitration does not apply to you. Further, new hires into the shop will be informed of what portions of the handbook are applicable to them and which are not. If you have any questions about this, please feel  
35 free to see me.

There was no evidence adduced how or to whom this memorandum was distributed.

40 In *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978) Respondent issued a disavowal of a supervisor’s unlawful statements that were violative of Section 8(a)(1) of the Act. The Board held that for a repudiation of unlawful conduct to be effective:

45 [S]uch repudiation must be “timely,” “unambiguous,” “specific in nature to the coercive conduct,” and “free from other proscribed illegal conduct.” *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024.

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<sup>10</sup> GC Exh. 8.

Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corporation*, 228 NLRB 326, 340 (1977). And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights.

Here the August 13, 2013, notice to employees falls short of the *Passavant* test for several reasons. There is no evidence that Jordan's statements or the memo from Lopez were adequately distributed to employees. The memo is also ambiguous in that it states the "provisions of our current handbook have not been enforced for some time and will not be enforced until this matter is concluded." Lastly, this is only a temporary repudiation and does not give assurances that Respondent will not interfere with Section 7 rights in the future.

### *B. The termination of Frank Bartolomucci*

#### 1. The facts

Paragraph 8 of the complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by terminating its employee Frank Bartolomucci.

Frank Bartolomucci (Bartolomucci) was employed by Respondent as an auto mechanic (technician) from November 2003 until his termination on May 20, 2013. Bartolomucci was an active participant in the union organizing drive in 2010, which resulted in the Union's certification by the Board as the mechanics' collective-bargaining representative in October 2010. Bartolomucci openly wore union buttons at work, placed union stickers on his tool box at Respondent's facility and talked to fellow employees about the Union. In May 2010, Bartolomucci participated in picketing to support the Union on one occasion for about 3 hours in front of Respondent's facility. Former Service Manager Tony Mattice saw Bartolomucci engaged in picketing on this occasion, referring to Bartolomucci and two other mechanics as rats. After the Union was certified, Bartolomucci participated in at least 20 collective-bargaining sessions on behalf of the Union with Respondent.

On May 20, 2013, Human Resources Manager Lopez and Service Director Michael Creedon gave Bartolomucci a notice of termination<sup>11</sup> and informed him that he was being fired for stealing used tires and being insubordinate by refusing work earlier that day. The notice of termination provided that Bartolomucci was terminated because he:

"Violated Company Policy as stated in the Momentum Employee Handbook page 33 New & Used Parts & Insubordination page 31 of the Employee Handbook."

Respondent's theft policy is found in two places in its employee handbook. The Momentum employee handbook provides at page 33:

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<sup>11</sup> GC Exh. 17.

## New and Used Parts

All parts removed from either customer vehicles or vehicles owned or operated by the Company are the property of the Company. Employees may not remove from the premises any new or used parts without being properly billed or receiving written authorization from the parts manager or service manager.<sup>12</sup>

Respondent's employee handbook also has a theft policy which states:

### Theft

Theft by employees will not be tolerated. Removing any salvageable items from the property shall be considered theft. Employee theft will result in disciplinary action up to and including termination, and may also result in civil and criminal penalties. Unless it is part of your normal duties, removal of company property from the premises is prohibited without express permission from the appropriate supervisor or manager.<sup>13</sup>

Respondent's employee handbook has a provision dealing with insubordination:

### Insubordination

All employees must follow directions from a supervising official. It is a violation of Company policy for an employee to refuse to follow supervisor or management official directions, or to act in an insubordinate manner toward a supervisor or management official. Full cooperation from an employee is expected when the Company is investigating potential misconduct. It is considered insubordination to refuse to fully disclose information in the course of a Company investigation or interfere with the investigation. Insubordination will not be tolerated and may result in discipline, up to and including termination. If you believe that a supervisor's direction is inappropriate, or violates company policy, you are urged to use Hotlink/HR.<sup>14</sup>

## *a. Respondent's policy regarding used parts and tires*

### (i) Bartolomucci's testimony

Bartolomucci stated that since 2008, he has taken used, discarded tires from both Respondent and its predecessor. The discarded or used tires are those tires removed from customers' cars and had little tread wear remaining. Bartolomucci estimated he had taken about 100 tires in the last 3 years. He has also seen other mechanics take used tires, including fellow mechanics Lal and Kobert.

Bartolomucci said that he had two conversations with Respondent's former Service Manager Victor Corona in 2012 regarding taking used tires from Respondent's shop. The first

<sup>12</sup> GC Exh. 4, p. 33.

<sup>13</sup> Id. at p. 31.

<sup>14</sup> Id. at p. 32.

conversation occurred in about February or March 2012. Corona said used tires were cluttering the shop and Bartolomucci asked if he could take some. Corona replied that Bartolomucci could take as many as he wanted. A few months later Bartolomucci had another conversation with Corona where Corona told Bartolomucci not to take a used tire unless it was replaced with another.

In February 2013, Bartolomucci claims he had a conversation with Respondent's new Service Manager Sheila Bamba. Bamba had been service manager about 1 month at this time. Bartolomucci told Bamba that Corona told him he could take used tires if he replaced them with another. Bamba replied that she did not know and that Parts Manager Dernoncourt is the one you should see about tires. When Bartolomucci spoke with Dernoncourt about taking used tires, Dernoncourt said "I don't know talk to Bamba." When Bartolomucci told Dernoncourt that Bamba told him to talk to Dernoncourt, Dernoncourt replied he did not know. Later that day Bartolomucci spoke with Bamba again and said Dernoncourt did not know about the tire policy and asked if she cared if he took used tires. Bamba, who was on the phone, replied that she did not care what he did with the tires. I found Bartolomucci a credible witness. His testimony was detailed, particularly about his conversations with Bamba, Dernoncourt and Corona about taking used tires and had a ring of truth. Further, his testimony concerning taking tires is corroborated by Corona.

#### (ii) Corona's testimony

Victor Corona (Corona) has been a service manager at various car dealerships for 20 years. He worked as Respondent's service manager from about February 2012, to about January 2013. Corona said that he was aware that Respondent's service technicians were taking used parts and tires shortly after he started. Corona said he saw Kobert take a used engine block and mechanics mount used tires on their own vehicles including Kobert, Johnny and sales people. When he became aware of this practice, Corona told the mechanics they needed his approval to take them. After this directive to the mechanics, they would let Corona know when they were taking scrap tires or other parts. While Corona discovered that mechanics, including Bartolomucci, were taking scrap tires or other parts without notifying him, during service meetings he brought up this subject and reminded the mechanics to let him know when they took something. Corona said he saw mechanics Lal, Oscar, Frank, and Johnny take tires without permission and only reminded them to ask permission.

In February to March 2012, Bartolomucci spoke with Corona about used tires cluttering the shop. Bartolomucci asked if he could take the used tires for his own truck and Corona said he could take as many as he wanted. A few months later Corona told Bartolomucci not to take any more used tires unless he replaced it with another tire. Bartolomucci followed this new rule.

In about August 2012, Corona had a conversation with Respondent's owner Rahim Hassanally. Corona advised Hassanally that mechanics were taking used tires and parts. Hassanally asked Corona what they should do about this issue. Corona said it was "SOP" (standard operating procedure) for mechanics to take used parts and tires. Hassanally told Corona not to ruffle any feathers and that Corona ran the shop. Respondent did not call Hassanally to testify at the hearing, leaving Corona's testimony unrebutted. I will draw the

inference that it would have corroborated Corona's testimony. *Parkside Group*, 354 NLRB 801, 804 (2009).

Respondent argues that Corona was not a credible witness; contending that when confronted with his Board affidavit, which omitted that he required permission to be obtained to take tires, Corona shrugged this off saying he made a mistake. However, the affidavit was not used to impeach Corona but rather to refresh his recollection and upon reviewing the affidavit he merely reaffirmed that he required permission to take used tires. Respondent also argues that Corona was argumentative with Respondent's counsel regarding whether dispatch was in good shape. I find no evidence that Corona was argumentative. He explained what he meant by "in good shape" clearly and without bias or prejudice toward Respondent. Similarly, Respondent contends that Corona displayed antipathy towards it and its relationship with the Union. To the contrary, the record reflects that Corona enforced Respondent's used parts and theft policies, by requiring employees to seek permission before taking used ties or parts, as stated in its handbook. Inexplicably, Respondent argues that Corona demonstrated bias and prejudice to Respondent in his admission that he tried to get Lopez to fire Bartolomucci because he complained about his benefits. To the contrary this appears to show a bias and prejudice against Bartolomucci, yet Corona corroborates much of what Bartolomucci said.

I found Corona to be a credible witness. Since he is not employed by Respondent and there is no evidence of any bias or prejudice toward Respondent, his testimony is that of a neutral witness and particularly credible. He was not impeached in any manner nor was he inconsistent in his testimony. I will credit his testimony.

### (iii) Other mechanics' testimony

Zack Morgensen (Morgensen) has been Respondent's parts counterperson from June 2010 to the present. He said that no one was allowed to take used parts or tires. He recounted a meeting with Corona that included Bartolomucci in 2012, where Corona said no one was to take parts without permission. Morgensen said he never saw employees taking tires out of the shop and knew nothing about a practice of replacing discarded tires with another tire. Morgensen spent most of his time behind the parts counter and was in no position to observe what occurred in the service area. Moreover he was part of the parts department and was not in a position to give probative evidence about what Corona may have told other mechanics on any number of other occasions.

Rafael De La Rosa (De La Rosa) who has worked as Respondent and its predecessor's parts counterperson from 2007, to the present, said that taking used parts was against Respondent's policy. De La Rosa said no one told him taking used tires was permitted. De La Rosa claims that there was a 2012 meeting with him, Corona, Dernoncourt, Morgensen and Bartolomucci. According to De La Rosa, Corona said that under no circumstances could parts be removed or taken for personal use. He also denied that Bartolomucci said he had been taking tires with the permission of Corona. He denied Corona saying that used tires could be taken so long as a replacement was substituted. De La Rosa's convenient testimony is inconsistent with Corona's testimony as well as Bartolomucci's and Morgensen's regarding Corona's edict regarding used tires. Moreover, as a parts person and not employed in the service department, De

La Rosa was in no position to know what Corona may have told other mechanics on any number of other occasions about taking used tires. I do not credit his testimony.

Jesse Kobert has been Respondent's shop foreman since June 2010. He testified that it was Respondent's policy that no used parts could be taken from vehicles. Kobert denied ever taking used tires or seeing any other employees take used tires during Mattice's tenure. Kobert denied that Corona ever said it was permissible to take used tires or that used tires could be taken if replaced with a substitute. However, Kobert was impeached by his July 15, 2013 Board affidavit, at lines 7–8, "There were other techs collecting other things like catalytic converters, a portion of the car that does the emissions."<sup>15</sup> He was also impeached by Corona who stated Kobert took a used engine as well as used tires. It is obvious that Kobert, aware of what happened to Bartolomucci for taking used tires, tailored his testimony to protect himself and his employer. I do not credit his testimony.

Edgar Medina (Medina) has been Respondent's mechanic for the last 15 years. While Medina claims that Mattice and Corona told employees they could not take used parts or tires, he could not recall the words either used. Moreover his testimony that Corona said tires could only be taken with permission is consistent with both Corona and Bartolomucci's testimony and is essentially what Respondent's used parts and theft policies state. His testimony is of little value.

#### iv. Mattice's testimony

Tony Mattice was both Respondent and its predecessor White Motor Sales' service manager from about 2010 through 2011. He is still employed by Respondent at another of its dealerships as service manager. Mattice claimed he could not recall any reports that Bartolomucci or any other technicians were taking used tires. However, Mattice was contradicted by Respondent's mechanic Jesse Kobert who testified that he reported to Mattice that Bartolomucci was taking discarded tires.

Moreover, based on Corona's credited testimony, it is apparent that when he arrived as Respondent's service manager in early 2012, it was common for mechanics to be taking used parts and tires. It is apparent that as a current employee of Respondent, Mattice tailored his testimony to suit his employer. I do not find his testimony credible.

#### v. DERNONCOURT'S testimony

Brian DERNONCOURT (DERNONCOURT) has been Respondent's parts manager since November 2011. DERNONCOURT stated that in a meeting with him, Corona, Bartolomucci, De La Rosa and Morgensen that Corona said nothing is to be removed from the premises without his permission, that it was theft to do so. DERNONCOURT said that nothing was mentioned about replacing tires taken and he never saw employees taking used tires. However, DERNONCOURT admitted that he was not present for the entire meeting. In May 2013 DERNONCOURT told Bamba and Lopez that his memory of the Corona meeting was not clear. I do not find DERNONCOURT's testimony concerning the meeting with Corona and Bartolomucci probative or credible.

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<sup>15</sup> Tr. at 1044, LL 9–11.

In about February 2013, Dernoncourt said Bartolomucci asked him if he could take used tires and he said, “I told him no, but—I referred him to Sheila Bamba to see what—how she felt about it.”<sup>16</sup> According to Bamba, on May 8, 2013, Dernoncourt’s recollection of this event was limited to him telling Bartolomucci he did not know what the policy was and to go see Bamba.

Initially Dernoncourt put his meeting with Bamba before the meeting in the parts department with Corona, Dernoncourt, Bartolomucci, Morgensen and De La Rosa where the issue of taking parts or tires was discussed. Later Dernoncourt said this meeting occurred after Corona left and Bamba became service manager.

I find that Dernoncourt’s memory of this meeting is no better than his recollection of the meeting with Corona and Bartolomucci. As a current employee of Respondent, it appears Dernoncourt tailored his testimony to protect himself and his employer. While Dernoncourt claims he told Bartolomucci that he could not take tires, if the policy was so clear to him, as he claims, there would be no need to refer him back to Bamba. Moreover, his testimony is contradicted by Bamba who said Dernoncourt told her and Lopez on May 8, 2013, that he told Bartolomucci he did not know the used tire policy and he should see Bamba. It is more likely he had no idea what the service department policy regarding used tires was and told Bartolomucci to go back to Bamba, who ran the service department, as Bartolomucci claims.

#### vi. Bamba’s testimony

In about February 2013, Sheila Bamba (Bamba) replaced Corona as service manager. According to Bamba not long after she became service manager, Bartolomucci asked her if he could take used tires if he exchanged them for ones he had at home. Bamba said, “. . . you know Frank, I don’t know. I don’t think it’s a good idea but to ask Brian since he handles tire waste.”<sup>17</sup> Bamba claims that Bartolomucci did not come back to her after speaking with Dernoncourt. Given her preoccupation with other business on the phone, it is not surprising that she could not recall Bartolomucci’s return conversation. I credit Bartolomucci over Bamba as to their conversation in February 2012 regarding tires.

#### a. Respondent’s investigation of Bartolomucci taking used tires

On about May 8, 2013, after two employees reported that Bartolomucci had taken tires from the shop, Respondent began an investigation into Bartolomucci’s conduct.

#### (i) Lal’s’ testimony

Ashneel Lal (Lal) has been employed by Respondent or its predecessor for 8 years as a mechanic. At the hearing Lal denied seeing Bartolomucci or any other employee taking used tires. Lal claimed that in May 2013, he was taking tires off rims and Bartolomucci asked if he could have the tires. Lal replied that you are not supposed to. Bartolomucci replied that it was Corona’s rule and Bamba would not care about it. The following day Lal could not find the tires he was working on in the discarded tire pile. However he did not see Bartolomucci take them.

<sup>16</sup> Tr. at 888, LL 9–15.

<sup>17</sup> Tr. at 1103, LL 11–12.

On May 15, 2013, Lal sent an email<sup>18</sup> to Lopez. At the hearing Lal said he sent the email about 1 or 2 days after his conversation with Bartolomucci. Contrary to Lal’s assertion at the hearing, the email states that his conversation with Bartolomucci occurred about 1 week ago. Lal goes on in the email to state he was dismounting four tires from a vehicle and Bartolomucci asked if he could have them. Lal said he was not supposed to take them but Bartolomucci said “That was Vic’s rule, Sheila wouldn’t care.” Lal explained he left the tires at the tire machine but they were not there the following morning and he assumed Bartolomucci took them. Lal is currently employed by Respondent and like Kobert was well aware of what happened to Bartolomucci in taking used tires. His denial of ever taking tires or used parts or seeing other mechanics ever take tires or used parts is self serving and in view of both Corona and Bartolomucci’s testimony that it was commonplace for mechanics to take used parts and tires, his testimony is suspect. His email further does not identify who took the tires he was dismounting. Moreover in view of Bartolomucci’s earlier May 8, 2013 conversation with Lopez and Bamba about taking tires and their edict that he could no longer take used tires, it is highly suspect that Lal’s conversation with Bartolomucci took place on May 13 or 14 but as stated in the email about a week before, prior to Bartolomucci’s May 8 conversation with Lopez and Bamba.

(ii) De La Rosa’s testimony

Parts counterperson De La Rosa sent an e mail<sup>19</sup> to Lopez on May 9, 2013, advising that on May 7, 2013, he saw Bartolomucci placing used tires in his truck. The following day De La Rosa could find only two tires in the tool shed where used tires were kept.

(iii) Bamba’s testimony

According to Bamba in early May 2013, Lopez came to her and said she had received reports someone had been taking tires. Lopez then asked Bamba if Bartolomucci had asked for permission to take tires. Bamba told Lopez, “. . . I told him, no, I don’t think it’s a good idea. Ask Brian.”<sup>20</sup> Lopez and Bamba then called Dernoncourt into Bamba’s office. Lopez asked Dernoncourt if Bartolomucci had asked him if he could take tires and Dernoncourt replied he had said, “I don’t know, go ask Sheila.”<sup>21</sup>

Later that day Lopez and Bamba called mechanic Jeff Johnson into Bamba’s office and asked him if he had seen Bartolomucci take tires on May 7. Johnson replied he did not but that he had seen him take tires openly on prior occasions and assumed he had permission.

Bartolomucci was next called into Lopez’ office. Lopez told Bartolomucci she had received reports that he had taken scrap tires from the shop, and he admitted that he had. Bartolomucci said former Service Manager Corona had given him permission to do so, as long as he replaced the tires he took, and that other employees were also taking tires. Lopez responded, “okay, well, Vic [Corona] no longer works here . . . did you ask Sheila [Bamba]?”<sup>22</sup>

<sup>18</sup> R. Exh. 14.

<sup>19</sup> R. Exh. 15.

<sup>20</sup> Id. at p. 1106, LL 15–16.

<sup>21</sup> Id. at p. 1107 LL 5–8.

<sup>22</sup> Tr. at 1112, LL 3–4.

Bartolomucci said yes and that Bamba told him she said she did not know what the policy was and to go ask Parts Manager DERNONCOURT. When Bartolomucci asked DERNONCOURT about the policy, DERNONCOURT said he did not know and to ask Bamba. According to Bamba, Bartolomucci said he did not return to speak with her. However, Bamba contradicted him and said you asked me and I told you it wasn't a good idea.

Bamba's recollection that Bartolomucci did not return to speak with her after his conversation with DERNONCOURT is not credible. The testimony is consistent that DERNONCOURT told Bartolomucci to go back to speak with Bamba about the used tire policy. Bartolomucci says he went back and spoke with Bamba and, while on the phone, told him that she did not care what he did with the tires. Bamba's confusion about this conversation is made apparent when she corrected Bartolomucci about not returning to speak with her and saying that was when she told him taking the tires was not a good idea. It is obvious that Bamba made this statement when Bartolomucci first approached her about the tires and she directed him to DERNONCOURT. It is obvious she has no recollection of Bartolomucci's return conversation where she told him she did not care what he did with the tires. I do not credit Bamba about her conversation with Bartolomucci about taking used tires but rather credit Bartolomucci's version.

#### iv. Lopez' testimony

According to Lopez when she and Bamba spoke with DERNONCOURT, Lopez asked DERNONCOURT if he had given Bartolomucci permission to take tires and DERNONCOURT replied, no. This is inconsistent with Bamba's version of what DERNONCOURT told Bartolomucci. DERNONCOURT added that at a parts meeting Corona told Bartolomucci employees were not to take used parts from the shop. Lopez interviewed employees Johnson, del Rosario and Kobert and asked if they had seen Bartolomucci take used tires. Each replied they had seen Bartolomucci take tires but neither Johnson nor del Rosario could not recall when; Kobert said it happened when Mattice was service manager and he had reported it to Mattice.

Bartolomucci was interviewed next. Lopez asked if he had taken tires and Bartolomucci admitted he had. Lopez said this was against company policy and asked Bartolomucci about a meeting with Corona. Bartolomucci told Lopez that Corona had given him permission to take tires as long as he replaced them with another. Lopez asked Bartolomucci if he asked Bamba for permission to take tires and he answered he had and that Bamba said it was not a good idea but she was not sure and to ask DERNONCOURT. Bartolomucci said DERNONCOURT told him to ask Bamba and that Bartolomucci said he failed to ask Bamba. This is inconsistent with Bartolomucci's version of events and I do not credit Lopez.

Hassanally was not called as a witness by Respondent and Corona was never interviewed during this investigation.

#### c. Bartolomucci fired

On May 20, 2013, when Bartolomucci came to work, he asked Service Manager Bamba for PDI's, preparation of new cars, which are considered easy work that mechanics can make money on. Bamba said there were none but she would try to find some for him. Later a service writer gave Bartolomucci a check engine light job. According to Bartolomucci because he did

not have a computer he was unable to get the codes for this older car and was unable to perform the diagnosis. After working on the car for about 10 minutes, Bartolomucci advised the service writer he was unable to make a diagnosis and went to lunch at his designated time. The service advisor made no objection and said he would have someone else do the job. Former Service Manager Corona had told Bartolomucci to spend no more than a half hour diagnosing a car and then to bring the work order back if he was unsuccessful.

When Bartolomucci returned from work he saw other mechanics performing the PDIs he had requested earlier. Bartolomucci went to Bamba's office and asked her if she had PDIs for him. Bamba replied she had looked for him with PDIs but he was at lunch. Bartolomucci complained he was not getting enough hours and needed PDIs that others were getting. Bartolomucci said he would complain to the Union. Bamba told Bartolomucci that the shop doesn't revolve around you and found a used car for Bartolomucci to work on. Bamba claimed that Bartolomucci raised his voice during this exchange but admitted that she also raised her voice. The conversation took place in Bamba's office not in the open service area where other mechanics could hear the conversation. While Bamba claimed that Bartolomucci looked at the repair order and did not try to diagnose it, she later admitted in her testimony that Bartolomucci did not refuse to do the check engine light but he "... couldn't figure it out. So you gave it back to the advisor."<sup>23</sup> While Bamba claimed Bartolomucci refused to work on any cars he could not make money on, she admitted that he took the used car inspection she gave him and worked on it.

Bamba testified that she, Lopez and Respondent's owner Hassanally met in the afternoon of May 20 to discuss Bartolomucci. They discussed his theft of tires and his insubordination that day by raising his voice and refusing to take any work he felt he could not make money on.<sup>24</sup> Bamba related to Lopez the essence of her problem with Bartolomucci as:

She told him she had a used car job for him and she said that he was refusing to—to take the job, and that earlier in the day he had refused a check engine light, and that she could not manage this way. If she allowed him to pick and choose what he would do, what will she do with the other employees that wanted to pick and choose.<sup>25</sup>

According to Lopez, they discussed a prior example of insubordination by an employee who had refused an order from and then cursed at a manager, saying "I'm not going to f—cking do it."<sup>26</sup> However, Bamba said they discussed mechanic Pham taking oil and no other employees' insubordination.<sup>27</sup> Hassanally was never called to testify. Later they decided to fire Bartolomucci for insubordination and theft. I credit Bamba's testimony that no other example of insubordination was discussed. Bamba's testimony on this point is more likely to be true. The alleged insubordination was directed at her thus it is more likely that her recollection is the more accurate. Further Hassanally was not called. The inference is that he would have corroborated Bamba if called to testify.

<sup>23</sup> Tr. at 1130, LL 5–6.

<sup>24</sup> Tr. at 1135, LL 14–24.

<sup>25</sup> Id. at p. 1296, LL 9–14.

<sup>26</sup> Id. at p. 1322, LL 3–4.

<sup>27</sup> Id. at p. 1166, LL 14–17.

On May 20, 2013, after Bartolomucci worked on the used car and as he was getting ready to go home, he was told to go to Human Resources Manager Lopez's office, where Lopez and Service Director Michael Creedon gave him a notice of termination and informed him that he was being fired for stealing used tires and being insubordinate by refusing work earlier that day.<sup>28</sup>

## 2. The analysis

In order to establish a prima facie case that a discharge violated Section 8(a)(3) of the Act under the test set forth in *Wright Line, a Division of Wright Line Inc.*, 251 NLRB 1083 (1980), enf. granted 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) the General Counsel must show that the employee engaged in union activity, the employer had knowledge of that union activity and the employer bore animus towards the employee's union activity.

Having met this initial burden of proof the burden shifts to the employer who must prove that it would have taken the adverse action even absent the employee's union activity.

Where it is shown that an employers' proffered rationale for the adverse action is pretextual, the second portion of the Wright Line test is unnecessary. Pretext may also supply evidence of Respondent's antiunion animus. *Vision of Elk River*, 359 NLRB No. 5, slip op. at 3–4, 7 (2012).

Evidence of pretext has been found where the employee was disciplined for proffering a nondiscriminatory explanation that is not true, *Cincinnati Truck Center*, 315 NLRB 554, 556 (1994).

There is no dispute that Bartolomucci was an active and open union supporter. He wore pronoun insignia at work, picketed with the Union at Respondent's facility, and served on the Union's bargaining committee during negotiations with Respondent. There is also no dispute that Respondent was aware of these activities, having seen him on the picket line, at the bargaining table, and in the workplace expressing his support for the Union.

Respondent expressed its hostility toward Bartolomucci in May 2010, when Bartolomucci participated in picketing to support the Union in front of Respondent's facility. Tony Mattice, service manager for both Respondent and its predecessor, as well as Respondent's owner Hassanally were present and saw Bartolomucci engaged in picketing on this occasion. During the picketing, Mattice called Bartolomucci and two other mechanics rats.

As noted above evidence of pretext in an employer's reasons for adverse action can supply the necessary antiunion animus. Here, Respondent contends that it fired Bartolomucci for insubordination and theft of used tires in violation of its written policies.

The record establishes that Respondent's written policies concerning theft and used parts provide that used parts may not be taken without the permission of a manager. In 2012, former

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<sup>28</sup> GC Exh. 17.

Service Manager Corona told Bartolomucci that he could take used tires as long as he replaced the tire he took with another. Respondent's owner Hassanally was aware that Corona was aware mechanics were taking used parts and condoned it when he told Corona not to rock the boat. Respondent's failure to call Hassanally as a witness leads to the inference that if he had testified, he would have confirmed Corona's testimony that he knew mechanics were taking used tires and he had no objection. Moreover, in early 2013, when Bartolomucci told Service Manager Bamba that Corona had permitted used tires to be taken, she reaffirmed this policy by giving Bartolomucci permission to continue taking used tires by telling him she did not care what he did with the tires. It was not until May 8, 2013, that Respondent told Bartolomucci not to take any used tires. Despite Bartolomucci's claim that he had been given permission by Corona to take used tires, Respondent made no effort to contact him to determine if he had established a practice of giving permission to take used tires. I find that this defense is pretext.

As to the insubordination claim, the basis for this defense is the allegation that Bartolomucci refused to perform work on the day he was fired and raised his voice in speaking with Bamba about the work he was receiving. When Bamba, Lopez and Hassanally discussed terminating Bartolomucci, Bamba told them that Bartolomucci had refused to perform the check engine light and he refused to take a used car job. This was false as Bamba later admitted. Bartolomucci had attempted to perform the check engine light job and performed the used car job. That Bartolomucci was insubordinate in raising his voice to Bamba is likewise a pretext and is bolstered by Bamba's admission that she too raised her voice during this conversation, yet she was not disciplined. Moreover, assuming *arguendo* that the example of the employee fired for insubordination was discussed on May 20, this example was wholly different in degree from Bartolomucci's conduct. The employee fired refused a manager's order to move a car and said "I'm not going to fucking do it." Bartolomucci merely raised his voice as did Bamba. The heated conversation took place in Bamba's office not out in the open where other employees could hear. I find that this proffered reason for Bartolomucci's discharge is also pretext.

Having found that Respondent's asserted reasons for firing Bartolomucci pretext, I find that General Counsel has established a *prima facie* case that Respondent terminated Bartolomucci for engaging in union activity. This finding also precludes the necessity of engaging in the second part of the *Wright Line* test that Respondent would have taken the same action for those reasons, absent the protected conduct. *Vision of Elk River*, supra at 7 (2012).

I find that in terminating Bartolomucci, Respondent violated Sections 8(a)(3) and (1) of the Act.

### *C. The alleged violations of Sections 8(a)(5) and (1) of the Act*

#### 1. Reduction in employees' labor time

##### *a. The facts*

Paragraph 9(a) of the complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by reducing employees' labor time by issuing customer coupons on repairs and services without notice to or bargaining with the Union.

In about March 2011, mechanics told Union Representative Mark Hollibush that Respondent was issuing coupons that had the effect of reducing what they were paid for a given repair. The Union was not advised that Respondent was issuing the customer coupons. When the Union raised the issue at the bargaining table, Respondent denied that it had reduced employees' service time. In about August 2011, Respondent gave Hollibush an opportunity to review its records including repair orders and RTH reports that show the amount of time booked and the amount paid to technicians for a given repair job. Hollibush looked at a sample of repair orders and identified two examples where Respondent paid a technician a reduced service labor rate because of a coupon, as reflected in the notes he took while reviewing the records. Based on his conversations with mechanics and his review of Respondent's records, Hollibush was of the opinion that mechanics billable time was reduced.

At the hearing, Respondent failed to comply with General Counsel's subpoena<sup>29</sup> request to produce the records that formed the basis for Hollibush's conclusions. Accordingly, I received Hollibush's testimony and notes on the issue as secondary evidence. *Bannon Mills*, 146 NLRB 611, 614 n. 4 (1964). I will also draw the inference that if Respondent had produced the subpoenaed records, they would have supported Hollibush's testimony. *ADF, Inc.*, 355 NLRB 81, 85 (2010); *affd.* by 355 NLRB 351 (2010).

*b. The analysis*

Unilateral changes by an employer concerning mandatory subjects of bargaining without giving the union notice and an opportunity to bargain violate Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

It is well-established that an employer's regular and longstanding practices, even if those practices are not required by a collective-bargaining agreement, become terms and conditions of employment that an employer may not alter without providing a union with notice and opportunity to bargain. *Turtle Bay Resorts*, 355 NLRB 706 (2010); *Lafayette Grinding Co.*, 337 NLRB 832 (2002).

General Counsel contends that Respondent's decision to reduce unit employees' service labor time when customers used coupons changed the mechanics' rate of pay and was a unilateral change.

Respondent contends this allegation should be dismissed because Hollibush's handwritten notes identify only two cars and they are not accompanied by a coupon nor do Hollibush's notes reflect a coupon was used. Respondent argues that Hollibush had the opportunity to copy the documents and that his testimony was so vague that it should not be credited.

Contrary to Respondent's assertion, Hollibush's notes<sup>30</sup> reflect that coupons were used for two cars, the 2007 Corolla and the 2006 Siena and resulted in the reduction of hours billable

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<sup>29</sup> GC Exh. 3, item 24.

<sup>30</sup> GC Exh. 25.

by the mechanics. Moreover, had Respondent complied with the subpoena, as noted above, it is likely that the records would have reflected coupons were used that offset employees pay.

Respondent's unilateral implementation of the customer coupon program constituted a change in bargaining unit employees' wages, a mandatory subject of bargaining. Respondent's failure to notify or bargain with the Union before implementing this program violated Section 8(a)(5) and (1) of the Act. *Houston Building Services*, 296 NLRB 808 (1989).

## 2. The change in employees' work schedule and bypassing the Union

### *a. The facts*

Paragraph 9(b) of the complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by changing employees' work schedules from five 8-hour days per week to four 10-hour days per week without notice to or bargaining with the Union.

Paragraph 10(f) of the complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by bypassing the Union and dealing directly with unit employees by soliciting their vote on whether Respondent should change employees' work schedules.

The parties stipulated that about September 2010, Respondent changed the unit employees' work schedules from 5 days a week, 8 hours a day, to 4 days a week, 10 hours a day. The parties further stipulated that about December 2010, it changed the unit employees' work schedules back to 5 days a week, 8 hours a day. Respondent made these changes based on votes cast by the mechanics. Respondent did not notify the Union before making either change, and did not involve the Union in the vote regarding the schedule changes.

### *b. The analysis*

General Counsel contends that Respondent's change in work hours was an unlawful unilateral change and constituted direct dealing with its employees as a result of the unit employees vote.

Respondent contends that this allegation should be dismissed because it was the technicians who wanted to return to the 5-day/8-hour workweek and there is simply no evidence that Respondent unilaterally imposed this change.

The collective bargaining obligation of Section 8(d) of the Act requires that an employer meet and bargain exclusively with the bargaining representative of its employees. It prohibits an employer from dealing directly or indirectly with represented employees. *Armored Transport, Inc.*, 339 NLRB 374 (2003). In *El Paso Electric Co.*, 355 NLRB 544, 545 (2010). The Board set forth its criteria for finding direct dealing:

The established criteria for finding that an employer has engaged in unlawful direct dealing are "(1) that the [employer] was communicating directly with union represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in

bargaining; and (3) such communication was made to the exclusion of the Union.”  
*Permanente Medical Group*, 332 NLRB 1143, 1144 (2000), citing *Southern California Gas Co.*, 316 NLRB 979 (1995).

Respondent’s argument that it did not change its employees’ work hours is specious. Whether or not the unit employees voted to change the work schedule back to 5-day weeks 8 hours a day, it was Respondent who implemented this change without notice to or bargaining with the Union in violation of Section 8(a)(5) of the Act. *Houston Building Services*, supra.

However as to the direct dealing allegation, it appears that Respondent’s conduct falls short of the test set forth above in *El Paso Electric Co.* There is no evidence in this case that Respondent dealt directly with its employees in discussing changes to their working hours. While unilaterally acting on the employees’ petition to change hours violated the Act, as noted above, there is insufficient evidence to find Respondent instigated the action by communicating directly with unit employees. I will recommend dismissal of this allegation.

### 3. The change in employees’ wages

#### *a. The facts*

Paragraph 9(c) of the complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by changing employee Andy Pham’s wages from \$21 per hour to \$23 per hour without notice to or bargaining with the Union.

Paragraph 9(d) of the complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by changing employee Oscar Larin’s wages from \$21 per hour to \$23 per hour without notice to or bargaining with the Union.

In its answer Respondent admitted that it increased unit employee Andy Pham’s wages from \$21 to \$25 per hour on October 12, 2010. Respondent’s counsel notified the Union that it had done so by email<sup>31</sup> of the same date. The Union responded by demanding to bargain over all the technicians wages and terms and conditions of employment.<sup>32</sup>

Respondent also admitted in its answer that it increased unit employee Oscar Larin’s wages from \$21 to \$23 per hour on July 5, 2011. On July 6, Respondent’s counsel notified the Union of the wage increase by email.<sup>33</sup> Union counsel responded by letter dated July 25, 2011, objecting that the raise had been implemented without bargaining, that the amount of the raise was too small, and that the Union wanted to bargain over it and would object to any subsequent decrease in Larin’s wages.<sup>34</sup>

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<sup>31</sup> GC Exh. 24(j).

<sup>32</sup> Ibid.

<sup>33</sup> GC Exh. 24(m).

<sup>34</sup> GC Exh. 24(n).

*b. The analysis*

Respondent contends that the allegations that it unilaterally gave wage raises to Pham and Larin are now moot as these employees no longer work for Respondent and it can no longer bargain with the Union about their wage rates citing *Tri State Maintenance Corp.*, 167 NLRB 933, 935 (1967). *Tri State* is inapposite to the facts of this case. The holding in *Tri State* found a bargaining order ineffective since the employer no longer had a contract to work for the Veterans' Administration, making bargaining with the Union over wages ineffective. Here Respondent continues to exist and the Union can certainly bargain over wages even though the employees no longer work for Respondent.

Here the wage increases to Pham and Larin were made without notice to or bargaining with the Union and violated Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962).

4. Requiring employees to sign the arbitration agreement

*a. The facts*

Paragraph 9(e) of the complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by requiring employees to sign a binding arbitration agreement without notice to or bargaining with the Union.

In about June 12, 2012, Respondent modified its binding arbitration section of the At Will Arbitration Agreement it required employees to sign by adding the class-action waiver language. This change can be seen by comparing the At Will Arbitration Agreement by Bartolomucci on July 2, 2010<sup>35</sup> with the At Will Arbitration Agreement<sup>36</sup> 2 signed by Pereira on June 12, 2012. Respondent added the following language to the end of the binding arbitration section:

The arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including without limitation any claim that this Agreement is void or voidable. Thus, the Company and Employee voluntarily waive the right to have a court determine the enforceability and/or scope of this Agreement.

There is no evidence that Respondent otherwise notified the Union before it made the modifications to the At Will Arbitration Agreement.

*b. The analysis*

Respondent required employees to sign the At Will Arbitration Agreement as a condition of employment. In *Utility Vault Co.*, 345 NLRB 79, 80 n.2 (2005) the Board found that the unilateral implementation of an agreement requiring employees to arbitrate claims was a

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<sup>35</sup> GC Exh. 6.

<sup>36</sup> GC Exh. 7.

mandatory subject of bargaining and that the failure to bargain over signing the agreement violated Section 8(a)(5) of the Act. The Board also found that in requiring individual employees to sign the agreement as a condition of employment, the Respondent engaged in direct dealing and undermined the Union’s position as the employees’ exclusive bargaining representative in violation of Section 8(a)(5) of the Act. I find here that Respondent’s failure to notify the Union before making the changes violated Section 8(a)(5) of the Act.

Respondent contends that the binding arbitration agreements are no longer effective. As noted above, Respondent has failed to satisfy the *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978) test in that the record is devoid of any evidence that Jordan’s statements regarding the agreements not being enforced or Lopez’ memo regarding enforcement of the arbitration agreement were adequately distributed to employees. Lopez’ memo is also ambiguous in that it states the “provisions of our current handbook have not been enforced for some time and will not be enforced until this matter is concluded.” Lastly, this is only a temporary repudiation and does not give assurances that Respondent will not interfere with Section 7 rights in the future.

#### 5. The change in used tire policy

##### *a. The facts*

Paragraph 9(f) of the complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by changing its practice of allowing unit employees to remove scrap tires from its facility for personal use.

General Counsel contends that in about May 10, 2013, Respondent changed its policy of permitting technicians to take scrap tires, so long as they replaced them, to prohibiting employees from taking scrap tires.

Respondent argues that there has been no change in its written policy regarding used tires that required the employee to obtain permission from his their supervisor before taking removing used parts. It is Respondent’s position that Corona merely applied the policy, as stated in Respondent’s handbook.

The record reflects that shortly after he started as Respondent’s service manager in about February 2012, Corona became aware mechanics were taking used parts. Consistent with Respondent’s used parts and theft policies, Corona told the mechanics they needed his approval to take used tires. Later In February to March 2012, Corona told Bartolomucci that he could take as many used tires as you want. A few months later Corona told Bartolomucci not to take any more used tires unless he replaced it with another tire.

In about August 2012, Corona advised Hassanally that mechanics were taking used tires and parts. When Corona said it was “SOP” (standard operating procedure) for mechanics to take used parts and tires, Hassanally told Corona not to ruffle any feathers and that Corona ran the shop.

In February 2013, Bartolomucci had a conversation with Respondent's new Service Manager Sheila Bamba about taking used tires. Bartolomucci told Bamba that Corona told him he could take used tires if he replaced them with another. After going back and forth for an answer between Bamba and Parts Manager Dernoncourt without a resolution, Bamba, who was on the phone, told Bartolomucci that she did not care what he did with the tires.

On about May 10, 2013, Lopez told Bartolomucci it was against Respondent's policy to take used tires.

*b. The analysis*

In essence Respondent's policy regarding employees taking used tires and parts was that this practice was prohibited without the consent of a supervisor or the parts or service manager. Corona and Bamba both enforced that policy with respect to Bartolomucci by giving him permission to take used tires. Corona gave permission to take as many used tires as Bartolomucci wanted as long as they were replaced by another tire. In early 2013, when Bartolomucci advised Bamba of Corona's policy, she continued this practice, telling Bartolomucci she did not care what he did with the tires. In May 2013, Lopez told Bartolomucci he no longer had permission to take used tires.

I find no deviation from Respondent's written policies regarding taking of used parts or tires. Corona did not create a new policy when he told Bartolomucci he could take as many tires as he wanted. Corona was simply granting the permission required in Respondent's written policies. Moreover, Lopez did not change the policy when she told Bartolomucci he could no longer take tires, she was simply withdrawing the permission Corona and Bamba had granted.

I find no change in Respondent's extant policies regarding taking used parts or tires as embodied in its employee handbook. I will recommend that this allegation be dismissed.

6. The refusal to bargain over disciplining employees

Paragraph 11(a) of the complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with the Union over warning, counseling, disciplining or terminating unit employees.

This complaint allegation seems to be subsumed in the allegations concerning the refusal to bargain over the decision to terminate Bartolomucci discussed below, since there is no evidence that Respondent refused to bargain over this subject at the bargaining table or refused to bargain over disciplining any other unit employee.

7. The refusal to bargain over the decision or effects of terminating Bartolomucci

Paragraphs 11(b) and (c) of the complaint allege that Respondent violated Section 8(a)(1) and (5) of the Act by failing to bargain over the decision or the effects of terminating Frank Bartolomucci.

General Counsel takes the position that Respondent failed to honor the Union’s demand that Respondent bargain before issuing Bartolomucci any discipline.

Respondent contends that it bargained with the Union over the discipline to be given to Bartolomucci before his discharge in accordance with *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012).

*a. The facts*

As noted above, Respondent fired Bartolomucci on May 20, 2013. At the May 15, 2013, bargaining session, knowing that Respondent was investigating Bartolomucci for taking used tires, Hollibush demanded that Respondent bargain over any discipline it intended to issue to Bartolomucci. On May 20, 2013, Hollibush learned of Bartolomucci’s termination from Bartolomucci.

Since March 2010, the Union repeatedly demanded that Respondent bargain before issuing any discipline to bargaining unit employees.<sup>37</sup> On May 21, 2013, after learning that Bartolomucci had been fired, the Union demanded that Respondent bargain over that decision and its effects in phone calls and emails.<sup>38</sup> On May 22 and June 6, 2013, Respondent took the position that it had no obligation to bargain about Bartolomucci’s discharge.<sup>39</sup>

*b. The analysis*

In *Alan Ritchey, Inc.*, 359 NLRB No. 40 slip op. at page 6 (2012), the Board for the first time addressed the issue of whether an employer has an obligation to bargain with the collective-bargaining representative of its employees over the decision and the effects of employee discipline in the absence of a collective-bargaining agreement. The Board held that where the imposition of discipline is discretionary the obligation to bargain attaches to the decision to impose discipline as well as to the effects. The Board held at page 6:

Consistency with these precedents and their underlying principles demands that we apply the *Oneita Knitting* approach to require bargaining before discretionary discipline (in the form of a suspension, demotion, discharge, or analogous sanction) is imposed, just as we do in cases involving discretionary layoffs, wage changes, and other changes in core terms or conditions of employment, where bargaining is required before an employer’s decision is implemented. Accordingly, where an employer’s disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, we hold that an employer must maintain the fixed aspects of the discipline system and bargain with the union over the discretionary aspects (if any), e.g., whether to impose discipline in individual cases and, if so, the type of discipline to impose. The duty to bargain is triggered before a suspension, demotion, discharge, or analogous sanction is imposed, but after imposition for lesser sanctions, such as oral or written warnings.

<sup>37</sup> GC Exh. 24(e), (i) and (u).

<sup>38</sup> GC Exh. 24(ee), (ff).

<sup>39</sup> GC Exh. 24(gg) p. 2, (jj) p. 4.

The Board explained further at page 8:

Under today’s decision, after the employer has decided (with or without an investigatory interview) to impose certain types of discipline, it must provide the union with notice and an opportunity to bargain over the discretionary aspects of its decision before proceeding to implement the decision. As explained below, at this stage, the employer need not bargain to agreement or impasse, if it does so afterward. In exigent circumstances, as defined, the employer may act immediately, provided that, promptly afterward, it provides the union with notice and an opportunity to bargain about the disciplinary decision and its effects.

The Respondent’s obligation to bargain includes providing the union with notice and an opportunity to bargain before discipline is imposed. This duty requires enough advance notice to the union to provide for meaningful discussion concerning the grounds for imposing discipline as well as the grounds for the form of discipline chosen where this choice involves an exercise of discretion. This bargaining obligation also requires providing the union with relevant information where bargaining has been demanded.

The Theft<sup>40</sup> provision in Respondent’s employee handbook contain language that [theft], “. . . will result in disciplinary action up to and including termination.” The Insubordination<sup>41</sup> provision contains language stating that insubordination, “. . . may result in discipline up to and including termination.”

Like the disciplinary provisions in *Alan Ritchey*, the language of Respondent’s handbook provides that employee discipline for theft and insubordination leaves discretion for the severity of punishment, “up to and including termination.” Given the discretionary nature of the type of discipline or indeed if any discipline may be imposed in the case of insubordination, Respondent was under an obligation to bargain with the Union over the decision and effects of terminating Bartolomucci. Because the discipline imposed was in the form of the ultimate employment capital punishment, termination, Respondent was obligated to give the Union notice and bargain about its decision before implementation.

Respondent’s contention that it bargained with the Union over the decision to fire Bartolomucci is without merit. Discussions at the bargaining table prior to May 20, 2013, never indicated that Respondent intended to discipline Bartolomucci. Thus those discussions never implicated Respondent’s decision to discipline or the severity of punishment it intended to impose. These discussions were not the notice to the Union that is contemplated in *Alan Ritchey*.

Respondent’s argument that a finding that it failed to bargain under *Alan Ritchey* should not result in an order reinstating Bartolomucci since such an order would reward Bartolomucci for violating its theft policy, is without merit. This argument fails since I have found that Respondent’s termination of Bartolomucci for violation of its theft policy was pretext.

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<sup>40</sup> GC Exh. 4, p. 31.

<sup>41</sup> GC Exh. 4, p. 32.

I conclude that Respondent violated Section 8(a)(5) and (1) of the Act in failing to give notice to or bargain with the Union concerning its decision to terminate Bartolomucci and the effects of that decision.

## 8. The refusal to provide information

Paragraph 12 of the complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by failing to furnish the Union with witness statements pertaining to Bartolomucci's termination.

On May 21, 2013, after learning Bartolomucci had been fired, the Union requested information regarding Bartolomucci's firing, including the reasons therefore, contact information for all witnesses Respondent interviewed, and all witness statements.<sup>42</sup> Thereafter on May 22, while Respondent denied having an obligation to respond, it provided the Union an explanation of its reasons for firing Bartolomucci but refused to identify or provide witness statements or other evidence on which Respondent relied.<sup>43</sup>

An employer has a statutory obligation to provide a union, upon request, with information that is relevant and necessary to the union for the proper performance of its duties as a collective-bargaining representative. *Allen Storage & Moving Company, Inc.*, 342 NLRB 501 (2004); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). This obligation now extends to discipline in the absence of a collective-bargaining agreement under *Alan Ritchey*.

Under recently decided case law in *American Baptist Homes of the West*, 359 NLRB No. 46 (2012), overruling *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), the Board has held that an employer has an obligation under Section 8(a)(5) of the Act to identify witnesses and provide witness statements regarding the discipline of a unit employee. If the employer asserts a confidentiality interest, "the Board balances the union's need for the relevant information against any legitimate and substantial confidentiality interests established by the employer." *American Baptist Home* at 2.

Here, Respondent has never asserted any confidentiality interest in the requested identities and statements of witnesses who provided Respondent with information leading to Bartolomucci's termination. Respondent simply refused to provide the requested information in violation of Section 8(a)(5) of the Act. *American Baptist Homes of the West*, supra.

## CONCLUSIONS OF LAW

1. Respondent Fairfield Imports d/b/a Fairfield Toyota, Momentum Autogroup, and Momentum Toyota of Fairfield is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>42</sup> GC Exh. 24(ff).

<sup>43</sup> GC Exh. 24(gg).

2. Automotive Machinists Local Lodge No. 1173, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL–CIO, (Union), is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive collective-bargaining representative of Respondent’s employees in the following appropriate collective-bargaining unit:

All full time and regular part time Automotive Technicians employed by Respondent at its facility located at 2575 Automall Parkway, Fairfield, California, excluding all other employees, guards, and supervisors as defined in the Act.

3. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act.

a. Maintaining and enforcing the following rule in its employee handbook entitled “Outside Inquiries Concerning Employees” that provides:

All inquiries concerning employees from outside sources should be directed to the Human Resources Director. Employees are prohibited from providing information, including references, about Company employees to any outside source.

b. Maintaining and enforcing the following rule in its employee handbook entitled “Publicity” that states:

The Company may utilize media resources in the course of advertising, public relations or other similar conduct for business purposes. As such, the Company may use your photograph, picture and/or voice for promotion or advertising at any time, without notice and additional compensation. If you are approached by any member of the media and asked about any company information, please do not comment and kindly refer the person to your manager.

c. Maintaining and enforcing an At-Will Arbitration Agreement and Privacy Policy and Safeguarding Agreement and Confidentiality Agreement that states:

Employee agrees that all information communicated to him/her concerning the work conducted by or for Employer is confidential. Employee also agrees that all financial data, sales information, product specifications, customer names and addresses, vendor information, pricing and bid information, personnel information, and any documents generated by Employer, or by Employee in the course of his/ her employment are confidential. Employee further agrees that information concerning the work conducted by Employer, including but not limited to information concerning future and proposed products, projects or sales which are planned, under consideration or in production/process, as well as existing work/sales additionally constitute confidential information of Employer.

\* \* \*

Employee promises and agrees that he/she shall not disclose any confidential or trade secret information to any other person.

Employee shall use his/her best efforts to prevent inadvertent disclosure of any confidential information to any third party by using the same care and discretion that he/she uses with information he/she considers confidential.

d. Maintaining and enforcing a binding arbitration agreement that provides:

. . . I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other government dispute resolution forum between myself and the company (or its owners, directors, officers, managers, employees, agent and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the company, whether based on tort, contract, statutory or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers Compensation Act, and the Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. . .

e. By requiring employees to sign the binding arbitration agreement referenced above as a condition of employment

4. The Respondents committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by terminating Frank Bartolomucci for engaging in union and other protected activities.

5. By engaging in the following conduct, the Respondents committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act:

a. Firing Frank Bartolomucci without first notifying the Union or giving it an opportunity to bargain;

b. Refusing the Union's requests to bargain over the effects of its decision to fire Frank Bartolomucci;

c. Refusing to provide the Union with requested information regarding the firing of Frank Bartolomucci;

d. Unilaterally reducing technicians' wages by reducing service labor times when customers used coupons;

e. Unilaterally changing technicians' work schedules and unilaterally increasing technicians' wages;

5 f. Unilaterally changing its binding arbitration agreement and;

g. By failing and refusing to furnish the Union with copies of all witness statements pertaining to Frank Bartolomucci's termination.

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#### REMEDY

15 Having found that Respondent has violated Section 8(a)(1) of the Act by maintaining a rule entitled "Outside Inquiries Concerning Employees" that prohibits employees from providing information, including references about company employees, to any outside source; maintaining a rule entitled "Publicity" that instructs employees that "if you are approached by any member of the media and asked about any company information, please do not comment and kindly refer the person to your manager; maintaining a "Confidentiality Agreement" prohibiting employees from disclosing, copying, communicating, or divulging "... any material provided by  
20 [Respondent]"; maintaining a "Binding Arbitration Agreement" that requires employees to forgo any rights they have to resolution of employment-related disputes by collective or class action; and requiring employees to sign the "Binding Arbitration Agreement" referenced above as a condition of employment the recommended order requires that the Respondent revise or rescind its "Outside Inquiries Concerning Employees" rule, its "Publicity" rule, its "Confidentiality  
25 Agreement" and "Binding Arbitration Agreement" and advise its employees in writing that said rules have been so revised or rescinded and to make clear to all employees that the binding arbitration agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective action.

30 Having found that Respondent violated Section 8(a)(3) of the Act by terminating its employee Frank Bartolomucci because of his union activities, my recommended order requires the Respondent to offer Frank Bartolomucci immediate reinstatement to his former position, displacing if necessary any replacements, or if his position no longer exists, to a substantially  
35 equivalent position, without loss of seniority and other privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. My recommended order further requires that backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

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The recommended order also requires that the Respondent shall expunge from its files and records any and all references to the unlawful discharge issued to Bartolomucci, and to notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any way. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Further, the  
45 Respondent must not make any reference to the expunged material in response to any inquiry

from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against him in any other way.

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 8 (Oct. 22, 2010).

General Counsel also requests that Bartolomucci be reimbursed for any excess taxes owed as a result of a lump sum backpay award and that Respondent be ordered to complete the appropriate paperwork as set forth in IRS Publication 975 to notify the Social Security Administration what periods to which the backpay should be allocated as requested in the remedy section of the complaint.

In *Latino Express, Inc.*, 359 NLRB No. 44 (2012), the Board ordered that retroactively it will routinely require the filing of a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters. The Board also held that it will routinely require respondents to compensate employees for the adverse tax consequences of receiving one or more lump sum backpay awards covering periods longer than 1 year. The Board concluded that it is the General Counsel's burden to prove and quantify the extent of any adverse tax consequences resulting from the lump-sum backpay award and that such matters shall be resolved in compliance proceedings.

Pursuant to *Latino Express*, I will order that Respondent shall file a report with the Social Security Administration allocating any backpay awards to the appropriate calendar quarters.

Further, as I found that the Respondents made certain unlawful unilateral changes in the terms and conditions of employment of the unit employees, I shall recommend that the Respondent be ordered to, at the request of the Union, rescind any and all of those changes. These include unilaterally reducing technicians' wages by reducing service labor times when customers used coupons; unilaterally changing technicians' work schedules; unilaterally increasing technicians' wages; and unilaterally changing its binding arbitration agreement.

General Counsel also requests an order requiring Respondent, or a Board Agent if it so prefers, to read to a gathered group of its mechanics the remedial Notice to Employees. *Heartland Human Services*, 359 NLRB No. 76, slip op. at 4, n.1 (2013); *HTH Corp.*, 356 NLRB No. 182, slip op. at 8 (2011); *Homer D. Bronson Co.*, 349 NLRB 512, 515–516 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008). Having found that Respondent, in derogation of the Union's position as exclusive bargaining representative, made unilateral changes to employees' terms and conditions of employment in violation of Section 8(a)(5) of the Act, maintained unlawful work rules proscribing employees' rights to engage in Section 7 activity in violation of Section 8(a)(1) of the Act and fired chief union adherent Frank Bartolomucci in violation of Section 8(a)(3) of the Act a reading of the remedial notice will give the mechanics assurance that Respondent will not discriminate against them or make unilateral changes to their working conditions.

General Counsel also requests an order for a 1-year extension of the certification year which from the time of any order is necessary to remedy Respondent's unfair labor practices and permit the parties to engage in good-faith bargaining in the absence of unfair labor practices. *Mar-Jac Poultry*, 136 NLRB 785 (1962).

Here Respondent's predecessor refused to recognize or bargain with the Union from the date of certification on October 6, 2010 until May 12, 2012. Since June 22, 2010, Respondent has been a successor to White Motor Sales. Given the ongoing unfair labor practices by Respondent since June 2012, that have the effect of undermining the Union's strength as a collective-bargaining representative together with the predecessor's refusal to bargain for almost 2 years after certification of the Union, it is appropriate that the certification year be extended for 1 year. *All Seasons Climate Control, Inc.*, 357 NLRB No. 70 slip op. at 1, n1 (2011).

In the complaint General Counsel sought as part of the remedy that Respondent should be ordered to bargain 15 hours a week and give a written report to the Regional Director every 15 days regarding bargaining as well as to make employee negotiators whole for lost earnings. General Counsel seems to have abandoned this request as it was not argued in its post-hearing brief. In any event since there was no allegation in the complaint nor any evidence in the record that Respondent failed to meet at reasonable times and places for the purposes of collective bargaining or engaged in any dilatory tactics to avoid reaching a collective-bargaining agreement, it would appear that such a remedy is not appropriate here. Cf. *Gimrock Construction, Inc.*, 356 NLRB No. 83 (2011).

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>44</sup>

#### ORDER

The Respondent, Fairfield Imports d/b/a Fairfield Toyota, Momentum Autogroup, and Momentum Toyota of Fairfield its successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining and enforcing the following rule in its employee handbook entitled "Outside Inquiries Concerning Employees" that provides:

All inquiries concerning employees from outside sources should be directed to the Human Resources Director. Employees are prohibited from providing

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<sup>44</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

information, including references, about Company employees to any outside source.

- 5 (b) Maintaining and enforcing the following rule in its employee handbook entitled “Publicity” that states:

10 The Company may utilize media resources in the course of advertising, public relations or other similar conduct for business purposes. As such, the Company may use your photograph, picture and/or voice for promotion or advertising at any time, without notice and additional compensation. If you are approached by any member of the media and asked about any company information, please do not comment and kindly refer the person to your manager.

- 15 (c) Maintaining and enforcing an At-Will Arbitration Agreement and Privacy Policy and Safeguarding Agreement and Confidentiality Agreement that states:

20 Employee agrees that all information communicated to him/her concerning the work conducted by or for Employer is confidential. Employee also agrees that all financial data, sales information, product specifications, customer names and addresses, vendor information, pricing and bid information, personnel information, and any documents generated by Employer, or by Employee in the course of his/ her employment are confidential. Employee further agrees that information concerning the work conducted by Employer, including but not limited to information concerning future and proposed products, projects or sales which are planned, under consideration or in production/process, as well as existing work/sales additionally constitute confidential information of Employer.

\* \* \*

30 Employee promises and agrees that he/she shall not disclose any confidential or trade secret information to any other person.

35 Employee shall use his/her best efforts to prevent inadvertent disclosure of any confidential information to any third party by using the same care and discretion that he/she uses with information he/she considers confidential.

- (d) Maintaining and enforcing a binding arbitration agreement that provides:

40 . . . I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other government dispute resolution forum between myself and the company (or its owners, directors, officers, managers, employees, agent and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or

connection whatsoever with my seeking employment with, employment by, or other association with the company, whether based on tort, contract, statutory or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers Compensation Act, and the Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. . .

(e) Requiring employees to sign the binding arbitration agreement referenced above as a condition of employment.

(f) Firing Frank Bartolomucci for engaging in union activity or other protected-concerted activity.

(g) Refusing to bargain in good faith with Automotive Machinists Local Lodge No. 1173, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL–CIO, as the exclusive collective-bargaining representative of its employees in the following collective-bargaining unit:

All full time and regular part time Automotive Technicians employed by Respondent at its facility located at 2575 Automall Parkway, Fairfield, California, excluding all other employees, guards, and supervisors as defined in the Act.

(h) Unilaterally and without bargaining with the Union:

i. firing Frank Bartolomucci without first notifying the Union or giving it an opportunity to bargain;

ii. refusing the Union's requests to bargain over the effects of its decision to fire Frank Bartolomucci;

iii. refusing to provide the Union with requested information regarding the firing of Frank Bartolomucci;

iv. unilaterally reducing technicians' wages by reducing service labor times when customers used coupons;

v. unilaterally changing technicians' work schedules;

vi. unilaterally increasing technicians' wages; and

vii. unilaterally changing its binding arbitration agreement.

viii. failing and refusing to furnish the Union with copies of all witness statements pertaining to Frank Bartolomucci's termination.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) At the request of the Union, the Respondent shall rescind or revise the following rule in its employee handbook entitled “Outside Inquiries Concerning Employees” and notify its employees that it has done so:

All inquiries concerning employees from outside sources should be directed to the Human Resources Director. Employees are prohibited from providing information, including references, about Company employees to any outside source.

(b) At the request of the Union, the Respondent shall rescind or revise the following rule in its employee handbook entitled “Publicity” and notify its employees that it has done so:

The Company may utilize media resources in the course of advertising, public relations or other similar conduct for business purposes. As such, the Company may use your photograph, picture and/or voice for promotion or advertising at any time, without notice and additional compensation. If you are approached by any member of the media and asked about any company information, please do not comment and kindly refer the person to your manager.

(c) At the request of the Union, the Respondent shall rescind or revise the following At-Will Arbitration Agreement and Privacy Policy and Safeguarding Agreement and Confidentiality Agreement and notify its employees that it has done so:

Employee agrees that all information communicated to him/her concerning the work conducted by or for Employer is confidential. Employee also agrees that all financial data, sales information, product specifications, customer names and addresses, vendor information, pricing and bid information, personnel information, and any documents generated by Employer, or by Employee in the course of his/ her employment are confidential. Employee further agrees that information concerning the work conducted by Employer, including but not limited to information concerning future and proposed products, projects or sales which are planned, under consideration or in production/process, as well as existing work/sales additionally constitute confidential information of Employer.

\* \* \*

Employee promises and agrees that he/she shall not disclose any confidential or trade secret information to any other person.

Employee shall use his/her best efforts to prevent inadvertent disclosure of any confidential information to any third party by using the same care and discretion that he/she uses with information he/she considers confidential.

(d) At the request of the Union, the Respondent shall rescind or revise the binding arbitration agreement, notify its employees that it has done so and make it clear to employees

that signing this agreement does not waive their right to engage in all forums of their right to maintain employment related class or collective action:

5 . . . I and the Company both agree that any claim, dispute, and/or controversy that  
 either party may have against one another (including, but not limited to, any  
 claims of discrimination and harassment, whether they be based on the California  
 fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as  
 amended, as well as all other applicable state or federal laws or regulations) which  
 10 would otherwise require or allow resort to any court or other government dispute  
 resolution forum between myself and the company (or its owners, directors,  
 officers, managers, employees, agent and parties affiliated with its employee  
 benefit and health plans) arising from, related to, or having any relationship or  
 connection whatsoever with my seeking employment with, employment by, or  
 15 other association with the company, whether based on tort, contract, statutory or  
 equitable law, or otherwise, (with the sole exception of claims arising under the  
 National Labor Relations Act which are brought before the National Labor  
 Relations Board, claims for medical and disability benefits under the California  
 Workers Compensation Act, and the Employment Development Department  
 claims) shall be submitted to and determined exclusively by binding  
 20 arbitration . . . .

(e) Within 14 days from the date of the Board's Order, offer Frank Bartolomucci full  
 reinstatement to his former job displacing if necessary any replacements or, if that job no longer  
 exist, to substantially equivalent position, without prejudice to his seniority or any other rights or  
 25 privileges previously enjoyed and make Frank Bartolomucci whole for any loss of earnings and  
 other benefits suffered as a result of the discrimination against him in the manner set forth in the  
 Remedy section of my Decision. My recommended order further requires that backpay shall be  
 computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as  
 prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound  
 30 interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(f) Respondent shall also within 14 days of the Board's Order expunge from its files  
 and records any and all references to the unlawful discharge issued to Bartolomucci, and to  
 notify him in writing that this has been done and that the unlawful discrimination will not be  
 35 used against him in any way. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Further, the  
 Respondent must not make any reference to the expunged material in response to any inquiry  
 from any employer, employment agency, unemployment insurance office, or reference seeker, or  
 use the expunged material against him in any other way.

(g) At the request of the Union, the Respondent shall rescind the unilateral changes  
 40 made in its employees' terms and conditions of employment including:

i. Firing Frank Bartolomucci without first notifying the Union or giving it an  
 opportunity to bargain;

45 ii. Refusing the Union's requests to bargain over the effects of its decision to fire  
 Frank Bartolomucci;

iii. Refusing to provide the Union with requested information regarding the firing of Frank Bartolomucci;

5 iv. Unilaterally reducing technicians' wages by reducing service labor times when customers used coupons;

v. Unilaterally changing technicians' work schedules;

10 vi. Unilaterally increasing technicians' wages; and

vii. Unilaterally changing its binding arbitration agreement.

15 (h) The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 8 (Oct. 22, 2010).

20 (i) Respondent, or a Board Agent if Respondent so prefers, shall read to a gathered group of its mechanics the remedial Notice to Employees.

(j) Respondent shall file a report with the Social Security Administration allocating any backpay awards to the appropriate calendar quarters.

25 k. There shall be a 1-year extension of the certification year under *Mar-Jac Poultry*, 136 NLRB 785 (1962).

30 (l) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

35 (m) Within 14 days after service by the Region, post at its facilities in the States of California and Nevada copies of the attached notice marked "Appendix."<sup>45</sup> Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are  
40 customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such

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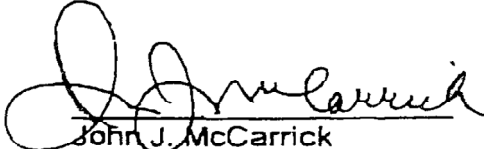
<sup>45</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 20, 2012,

(n) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

**IT IS FURTHER ORDERED** that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 3, 2014

  
John J. McCarrick  
Administrative Law Judge

## **APPENDIX**

### **NOTICE TO EMPLOYEES**

Posted by Order of the  
**National Labor Relations Board**  
**An Agency of the United States Government**

#### **FEDERAL LAW GIVES EMPLOYEES THE RIGHT TO**

Form, join or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Chose not to engage in any of these protected activities

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT maintain and enforce the following rule in our employee handbook entitled “Outside Inquiries Concerning Employees” that provides:

All inquiries concerning employees from outside sources should be directed to the Human Resources Director. Employees are prohibited from providing information, including references, about Company employees to any outside source.

WE WILL NOT maintain and enforce the following rule in our employee handbook entitled “Publicity” that states:

The Company may utilize media resources in the course of advertising, public relations or other similar conduct for business purposes. As such, the Company may use your photograph, picture and/or voice for promotion or advertising at any time, without notice and additional compensation. If you are approached by any member of the media and asked about any company information, please do not comment and kindly refer the person to your manager.

WE WILL NOT maintain and enforce our “At-Will Arbitration Agreement and Privacy Policy and Safeguarding Agreement and Confidentiality Agreement” that states:

Employee agrees that all information communicated to him/her concerning the work conducted by or for Employer is confidential. Employee also agrees that all financial data, sales information, product specifications, customer names and addresses, vendor information, pricing and bid information, personnel information, and any documents generated by Employer, or by Employee in the course of his/ her employment are

confidential. Employee further agrees that information concerning the work conducted by Employer, including but not limited to information concerning future and proposed products, projects or sales which are planned, under consideration or in production/process, as well as existing work/sales additionally constitute confidential information of Employer.

\* \* \*

Employee promises and agrees that he/she shall not disclose any confidential or trade secret information to any other person.

Employee shall use his/her best efforts to prevent inadvertent disclosure of any confidential information to any third party by using the same care and discretion that he/she uses with information he/she considers confidential.

WE WILL NOT maintain and enforce our “Binding Arbitration Agreement” that provides:

. . . I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other government dispute resolution forum between myself and the company (or its owners, directors, officers, managers, employees, agent and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the company, whether based on tort, contract, statutory or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers Compensation Act, and the Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. . . .

WE WILL NOT require our employees to sign the binding arbitration agreement referenced above as a condition of employment.

WE WILL NOT fire our employee Frank Bartolomucci for engaging in Union or other protected-concerted activity

WE WILL NOT refuse to bargain in good faith with Automotive Machinists Local Lodge No. 1173, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL–CIO, as the exclusive collective-bargaining representative of its employees in the following collective-bargaining unit:

All full time and regular part time Automotive Technicians employed by Respondent at its facility located at 2575 Automall Parkway, Fairfield, California, excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally and without bargaining with the Union:

- i. Fire Frank Bartolomucci without first notifying the Union or giving it an opportunity to bargain;
- ii. Refusing the Union's requests to bargain over the effects of its decision to fire Frank Bartolomucci;
- iii. Refusing to provide the Union with requested information regarding the firing of Frank Bartolomucci;
- iv. Unilaterally reducing technicians' wages by reducing service labor times when customers used coupons;
- v. Unilaterally changing technicians' work schedules;
- vi. Unilaterally increasing technicians' wages; and
- vii. Unilaterally changing its binding arbitration agreement.
- viii. Failing and refusing to furnish the Union with copies of all witness statements pertaining to Frank Bartolomucci's termination

WE WILL NOT In any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of our employees in the above described unit with respect to wages, hours, and other terms and conditions of employment.

WE WILL at the request of the Union, rescind or revise the following rule in our employee handbook entitled "Outside Inquiries Concerning Employees" and notify its employees that it has done so:

All inquiries concerning employees from outside sources should be directed to the Human Resources Director. Employees are prohibited from providing information, including references, about Company employees to any outside source.

WE WILL at the request of the Union, rescind or revise the following rule in our employee handbook entitled "Publicity" and notify its employees that it has done so:

The Company may utilize media resources in the course of advertising, public relations or other similar conduct for business purposes. As such, the Company may use your photograph, picture and/or voice for promotion or advertising at any time, without notice and additional compensation. If you are approached by any member of the media and asked about any company information, please do not comment and kindly refer the person to your manager.

WE WILL at the request of the Union, rescind or revise our At-Will Arbitration Agreement and Privacy Policy and Safeguarding Agreement and Confidentiality Agreement set forth below and notify our employees that we have done so:

Employee agrees that all information communicated to him/her concerning the work conducted by or for Employer is confidential. Employee also agrees that all financial data, sales information, product specifications, customer names and addresses, vendor information, pricing and bid information, personnel information, and any documents generated by Employer, or by Employee in the course of his/ her employment are confidential. Employee further agrees that information concerning the work conducted by Employer, including but not limited to information concerning future and proposed products, projects or sales which are planned, under consideration or in production/process, as well as existing work/sales additionally constitute confidential information of Employer.

\* \* \*

Employee promises and agrees that he/she shall not disclose any confidential or trade secret information to any other person.

Employee shall use his/her best efforts to prevent inadvertent disclosure of any confidential information to any third party by using the same care and discretion that he/she uses with information he/she considers confidential.

WE WILL at the request of the Union, rescind or revise our binding arbitration agreement set forth below, and notify our employees that it has done so and make it clear to our employees that signing this agreement does not waive their right to engage in all forums of their right to maintain employment related class or collective action:

. . . I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other government dispute resolution forum between myself and the company (or its owners, directors, officers, managers, employees, agent and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the company, whether based on tort, contract, statutory or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers Compensation Act, and the Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. . . .

WE WILL offer Frank Bartolomucci immediate reinstatement to his former position, displacing if necessary any replacements, or if his position no longer exists, to a substantially equivalent position, without loss of seniority and other privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL within 14 days of the Board's Order expunge from our files and records any and all references to the unlawful discharge issued to Bartolomucci, and to notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any way.

WE WILL at the request of the Union, rescind the unilateral changes made in our employees' terms and conditions of employment including:

- Firing Frank Bartolomucci without first notifying the Union or giving it an opportunity to bargain;
- Refusing the Union's requests to bargain over the effects of our decision to fire Frank Bartolomucci;
- Refusing to provide the Union with requested information regarding the firing of Frank Bartolomucci;
- Unilaterally reducing technicians' wages by reducing service labor times when customers used coupons;
- Unilaterally changing technicians' work schedules;
- Unilaterally increasing technicians' wages; and
- Unilaterally changing its binding arbitration agreement.

Fairfield Imports d/b/a Fairfield Toyota, Momentum  
Autogroup, and Momentum Toyota of Fairfield

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

901 Market Street, Suite 400  
San Francisco, California 94103-1735  
Hours: 8:30 am to 5:00 pm  
415-356-5130.

The Board's decision can be found at [www.nlrb.gov/case/20-CA-035259](http://www.nlrb.gov/case/20-CA-035259) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5183.